IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.294 OF 2007

Siddhi Vinayak Oudyogic Vasahat ...Petitioner

vs.

Laxmibai Bapu Tulshiram Naik & Ors. ...Respondents

WITH
WRIT PETITION NO.126 OF 2007

Siddhi Vinayak Oudyogic Vasahat ...Petitioner

vs.

Anjanabai B.Rambhau Vaykhande & Ors. ...Respondents

WITH
WRIT PETITION NO.127 OF 2007

Siddhi Vinayak Oudyogic Vasahat ...Petitioner

vs.

Eknath Suka Jadhav & Ors. ...Respondents

WITH
WRIT PETITION NO.293 OF 2007

Siddhi Vinayak Oudyogic Vasahat ...Petitioner

vs.

Gangaram Rama Jadhav & Ors. ...Respondents

Mr.Anilkumar Patil for the Petitioner in all the Petitions.
Mr.Milind Sathaye for Respondent Nos.1 and 2 in all the Petitions.

CORAM: A.S.OKA,J.
DATE : JUNE 14, 2007.

P.C.:

1. Heard Advocates for the contesting parties. Considering

the nature of the impugned order and the controversy involved, by consent of the Advocates for the parties, Writ Petitions are taken up for final hearing at the stage of admission.

2. It is not in dispute that the facts in all the four Writ Petitions are more or less identical. Therefore, for the sake of convenience, a reference is made to the facts of the case in Writ Petition No.294 of 2007.

3. The Petitioner is the original Plaintiff who has filed a suit for specific performance of alleged agreement for sale executed in favour of the Petitioner. According to the case of the Petitioner, the alleged agreement for sale was executed on 25th August 1990. It is alleged in the plaint that the alleged original agreement was in the custody of the Chief Promoter of the Petitioner-society. It is stated that he suddenly died on 17th October 1995. According to the case of the Petitioner, when an enquiry was made with the legal representatives and the family members of the said deceased Chief Promoter, initially the office bearers of the Petitioner were told that document is being searched. It is alleged that later on the office bearers of the Petitioner were informed that the document was not traceable. It is alleged that the original document has been misplaced and therefore, an attested copy of the said document has been produced on record of the suit.

4. An Application was made by the Petitioner-Plaintiff seeking permission of the Trial Court to lead secondary evidence of the alleged suit agreement. The aforesaid averments made in the plaint are also made in the said application at Exh.58. The said application was opposed by the contesting defendants by contending that even attested photostat copy of the alleged suit agreement was not produced along with the plaint. By the impugned order dated 13th November 2006, the learned Trial Judge rejected the said application.

5. With the assistance of the Advocates for the parties, I have perused the impugned order. The learned Trial Judge while rejecting the said application has observed that the agreement for sale entered into by the Chief Promoter of the Petitioner-Society cannot be admitted in evidence. The learned trial Judge further observed that the original document was itself inadmissible and the secondary evidence of the said document cannot be permitted to be led. The learned Trial Judge also observed that the alleged agreement is not admissible in evidence as the same has not been registered. The observation of the learned Trial Judge is that the agreement for sale need not be registered if the performance of the agreement is made within one year from the agreement for sale. He has further observed that if such period is for

one year or more, then in his opinion, the agreement for sale must be registered.

6. No elaborate discussion is necessary for stating that the aforesaid findings are completely erroneous and contrary to law. In fact, there was no occasion for the learned Trial Judge to go into this aspect at the stage of consideration of the Application made by the Petitioner. The only question which was to be considered was whether the Petitioner has made out a case for leading secondary evidence in accordance with section 65 of the Indian Evidence Act,1872. Without adverting to the requirement of section 65, the learned Trial Judge has completely misdirected himself.

7. The ground pleaded in the Application as well as in the plaint is that the alleged original agreement was in the custody of the Chief Promoter who died in the year 1995. The case made out is that the family members/legal representatives of the deceased Chief Promoter had informed the office bearers of the Petitioner that the original agreement was not traceable. Considering the ground which is pleaded in the Application made by the Petitioner, it will be necessary for the Petitioner to make a factual foundation for the contentions raised in the Application by leading evidence. Therefore, the Application made by the Petitioner will have to be heard afresh after the Petitioner-society leads its

evidence and till such time, the Application will have to be kept pending. At the time of considering the said Application, the learned Judge will have to consider all the relevant contentions raised by the parties regarding entitlement of the Petitioner to lead secondary evidence.

8. Hence, the Petitions must succeed in part and accordingly I pass the following order :

i) Impugned orders are quashed and set aside and the applications made by the Petitioner for seeking permission to lead additional evidence are restored to file.

ii) The trial court will consider the said applications on merits after the petitioner-society leads evidence at the time of trial.

iii) All the contentions of the parties to the Writ Petitions are expressly kept open.

iv) Parties and the concerned court to act upon an authenticated copy of this order.

JUDGE